Nos. 04-277 and 04-281

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE BY THE STATE OF NEW JERSEY, BOARD OF PUBLIC UTILITIES IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE

The State of New Jersey, Board of Public Utilities ("the Board") is the local franchising authority for cable television service in the State of New Jersey and is responsible for regulation of all public utilities, including telecommunication companies, as well as cable television companies in the State. This brief is submitted in support of the determination of the Ninth Circuit, below, which decision results in the ability of the Board to provide a level of customer service and regulatory control over cable modem service which would otherwise be unavailable to the consumers of the State.

SUMMARY OF THE ARGUMENT

The State of New Jersey, Board of Public Utilities files, as an *amicus curiae*, this brief in support of the decision of the United States Court of Appeals for the Ninth Circuit, which reversed the Federal Communications Commission ("FCC") and found that cable modem service contains both an "information service" component and a "telecommunications service" component. The Ninth Circuit based its decision upon a reasonable and appropriate reading of the Communications Act of 1934, as amended, ("the Communications Act") and upon the past precedent of the Circuit Court such that the decision should be affirmed. Likewise, in light of New Jersey's extensive and recognized regulation of cable providers, and the significant and pressing need to ensure that cable modem customers in the State are afforded, at a minimum, customer service regulation, it is appropriate and reasonable for this

Court to affirm the decision of the Ninth Circuit in designating some aspect of cable modem service as being subject to regulation under Title II of the Communications Act. A regulatory scheme such as this would continue to allow New Jersey to successfully meld the concerns of technological advancement and market controls with the "traditional" regulatory role of protecting the consumer from monopolistic or quasi-monopolistic pressures and shortcomings. This foundation places New Jersey in a position to provide insight to the Court in this matter.

ARGUMENT

I. The United States Court of Appeals for the Ninth Circuit correctly found that the provision of cable modem service includes a telecommunications service component such that regulation under Title II of the Communications Act is appropriate.

The *Brand X Internet Services v. Federal Communications Commission* court found, based upon its prior decision in *AT&T v. City of Portland*, 216 *F.*3d 871 (9th Cir. 2000), that cable modem service consists of both a telecommunications service component and an information service component. This determination, in addition to following the previous decision made by the Circuit, correctly interprets and implements the intention and implications of the Communications Act. The Circuit Court reasoned that, much as in the traditional telephone-based "dial up" form of Internet access, to the extent that a cable operator provides Internet access to its subscribers over its broadband facility, "it is

providing a telecommunications service as defined in the Communications Act." *Id.* at 878, quoted in *Brand X Internet Services v. Federal Communications Commission*, 345 *F.*3d 1120, 1129 (9th Cir. 2003).

As noted in the decision of the Brand X court, *stare decisis* required the finding that cable modem service consists of both telecommunications service and information service, following upon the reasoning of the Circuit Court in *AT&T v. City of Portland*. Further, and as most clearly articulated in the concurrence filed by the Honorable Sidney R. Thomas, a reading of the Communications Act that reflects the understanding that a "single" service such as cable modem service can consist of two or more regulatory elements is entirely in keeping with the statute. 47 *U.S.C.* § 153(44) indicates that common carrier regulations extend to a telecommunications carrier, but "only to the extent that it is engaged in providing telecommunications services." This reflects an underpinning that a telecommunications provider may also provide non-telecommunications services, for example information services, such that the Communications Act reflects an understanding of a separate regulatory environment. Likewise, the pole attachment provisions contemplate that cable systems may also provide telecommunications service, 47 *U.S.C.* § 224(d)(3), and that the underlying policy of the Communications Act calls for the encouragement of "advanced telecommunications capability" such as "broadband telecommunications," Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, §§ 706(a), 706(c)(1), 110 Stat. 56, 153 (1996). As noted by Judge Thomas, this "suggests that Congress intended some component

of the 'advanced telecommunications capability' to be subject to Title II powers governing telecommunications services." *Brand X Internet Services*, *supra*, 345 *F.*3d at 1138.

The decision below, especially in light of the rationale presented in the concurrence of Judge Thomas, comports with the language and previous interpretation of the Communications Act by the Ninth Circuit, and appropriately reflects the regulatory regime under which traditional "dial up" and digital subscriber lines find themselves. *E.g.*, *In the Matter of Federal-State Joint Bd. on Universal Serv.*, 13 *F.C.C.R.* 11,501, 11,539-40, 1998 WL 166178 (1998) (noting that while ISPs are information services, they lease or otherwise acquire telecommunications from telecommunications services over traditional telephone lines); *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 *F.C.C.R.* 24,012, 24,030, 1998 WL 458500 (1998) (noting that xDSL and other forms of packet switching are telecommunication services). As such, while the Ninth Circuit failed to recognize cable modem service as a system that can be regulated as a cable service under Title VI of the Communications Act, the Circuit Court's finding of a basis for regulation under Title II of the Communications Act as a telecommunications service provides at lease some level of appropriate regulatory oversight.

II. The State of New Jersey, in its regulation of cable television and telecommunications, provides an insight into the form of regulation that would be appropriate to cable modem services and demonstrates the fallacy of finding cable modem service to be a pure information service under Title I of the Communications Act.

In addition to New Jersey's assertion that the decision of the Ninth Circuit was legally correct, the decision to provide some level of regulatory oversight to cable modem service is a sound and correct policy as well and advances the purposes and underpinnings of the Communications Act. In order to appreciate the State's interest, it is necessary to understand, at least in brief, the nature of the Board's regulatory oversight in terms of cable and telecommunications.

Under the New Jersey Department of Public Utilities Act, codified at *N.J.S.A.* 48:2-1 *et seq.*, the Board of Public Utilities has been granted "general supervision and regulation of and jurisdiction and control over all public utilities," *N.J.S.A.* 48:2-13(a), and may require any such utility company to provide "safe, adequate and proper service," *N.J.S.A.* 48:2-23. Likewise, under the New Jersey Cable Television Act of 1972, as amended, *L.* 1972, c. 186, codified at *N.J.S.A.* 48:5A-1 *et seq.* ("the Cable Act"), the Board, through its Office of Cable Television ("OCTV"), has been granted the authority over cable television companies in the State to supervise and regulate all "property, property rights, equipment, facilities, contracts, certificates and franchises so far as may be necessary to carry out the purposes of the act," *N.J.S.A.* 48:5A-9(b), subject to the

limitations of federal law, 47 *U.S.C.* § 544(a). Further, under the Cable Act, the State legislature requires the Board to ensure the provision of safe, adequate and proper service to cable television subscribers throughout the State. *N.J.S.A.* 48:5A-10.

Under the Cable Act, a "cable communications system" or a "cable communications service" consists of "any communications service other than cable television reception service delivered through the facilities of a CATV [cable television] system and for which charges in addition to or other than those made for cable television reception service are made or proposed to be made." *N.J.S.A.* 48:5A-3(f). The New Jersey legislature thereby envisioned that cable television operators would provide services other than traditional cable television service and that the Board would assume as wide a regulatory oversight role as possible over cable operators. *N.J.S.A.* 48:5A-9. This is especially true in light of one of the foundations of the Cable Act – to "promote and encourage harmony between cable television companies and their subscribers and customers." *N.J.S.A.* 48:5A-2(c)(4). Thus, this regulatory scheme, especially in terms of cable television service, has created in New Jersey a unique regulatory environment: one which successfully melds the concerns of technological advancement and market controls with the "traditional" regulatory role of protecting the consumer from monopolistic or quasi-monopolistic pressures and shortcomings. This foundation gives New Jersey particular insight in this matter.

In New Jersey, under the Cable Act, cable television regulation on the State level is a bifurcated process: the local municipality has initial control over the use of the public rights-

of-way and negotiates the municipal consent under which a cable television operator receives a non-exclusive franchise for the political subdivision. *N.J.S.A.* 48:5A-22. Once the municipality has exercised its authority, the Board, as the federally recognized local franchising authority ("LFA"), 47 *U.S.C.* § 522(10); 47 *U.S.C.* § 543, reviews the actions of the municipality and ensures compliance with State and federal cable requirements. *N.J.S.A.* 48:5A-17. Additionally, in most cases, the OCTV also serves as the "complaint officer" for the municipality, and thus receives the majority of the complaints concerning the service and other offerings of cable providers. Finally, the Board implements and regulates cable television service based upon the requirements of the federal Communications Act and the regulations promulgated by the FCC.

In New Jersey, cable modem service is available to approximately 3.8 million households, resulting in an excess of 912,000 subscribers or an average penetration of 24%.[1] Because of the aforementioned regulatory scheme in New Jersey, the Board's OCTV serves most of the municipalities in the State as the statutorily-required complaint officer. This results in thousands of calls per year, dealing with all forms of cable television service. Because of this statewide regulatory role, the typical cable television subscriber, in the event of a complaint or difficulty with a cable operator, looks to the Board for complaint resolution. Based upon the manner in which cable modem service has been advertised and integrated into the standard cable television service, as can be seen on the websites

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[1] Based upon compiled data by the OCTV as of June 30, 2004.

of most of the major operators, *e.g.* http://www.cablevision.com/, customers expect and look to the Board for resolution of cable modem service complaints or issues, even in the event such offerings are actually classified as telecommunications services.

The Board's association in the minds of subscribers with customer service as to all elements of cable services, including telecommunications services, if combined with the FCC's reading of the Communications Act, would place the Board in a difficult position: as the "front-line" customer service entity, most subscribers, legislators and elected officials expect some level of regulation by the Board, yet a determination of cable modem service as being entirely an "information service" places the process outside of any jurisdiction of the Board. This example illustrates one problem: in January, 2002, the Internet service provider ("ISP") Excite@Home filed for bankruptcy and caused Comcast, who had a relationship with the company, to transfer all of its Internet services to a new facility. Over a six-day period, the Board's staff received in excess of 2,200 complaint calls related to the failure of the network conversion. While the Board attempted to take what steps it could to help in the transition, and while Comcast behaved in an appropriate manner and cooperated with the State during the transition, the Board was nevertheless at the mercy of the cable operator and without any regulatory foundation to require the cable operator to even meet to discuss the issues with Board staff, much less to act based upon the Board's suggestions or requests.

Traditionally, the OCTV and the Board have taken a vigorous approach to protecting the customers of cable television operators and telecommunications services, and would, if given the opportunity, do the same for cable modem service customers. Under the Board's customer service regulations, the OCTV and the Board ensure regular notice to customers of charges, channel changes, upgrades and deletions, tariff information, and other information, *e.g.*, *N.J.A.C.* 14:18-3.18; enforce service call schedules, *N.J.A.C.* 14:18-3.12; require automatic outage credits, *N.J.A.C.* 14:18-3.5; and help to ensure proper billing and termination procedures, *N.J.A.C.* 14:18-3.8 – 3.11. In each of these cases, the Board serves to ensure that both the customer and the cable operator are treated fairly and to moderate the relationship between provider and customer in a reasonable and fair manner. Likewise, telecommunications services have also been regulated, within the limit of federal law, by the Board, albeit not through the OCTV. The Board continues to impose customer service protection requirements upon telecommunications providers, including issues of deposits for service, *N.J.A.C.* 14:3-7.1; billing disputes, *N.J.A.C.* 14:3-7.13; and termination of service, *N.J.A.C.* 14:3-7.17. Thus, the Board has and continues to exercise, to the extent possible, its regulatory authority over cable and telecommunications services, and would propose to continue to do so with cable modem service.

Currently, under the FCC's definition under review, the Board is unable to provide this level of customer protection to cable modem service customers, although the decision of the Ninth Circuit to allow for Title II regulatory treatment would allow that to change. While the Board would, in a vacuum and

as a policy matter, call for the regulation of cable modem service under the auspices of Title VI (47 *U.S.C.* § 521 *et seq.*) of the Communications Act, the Board is satisfied that, in light of the decision of the Ninth Circuit, and the Board's support of that decision, regulation under Title II (47 *U.S.C.* § 201 *et seq.*) as a common carrier provides the appropriate possibility of local regulatory control such that the Board will retain its ability to protect customers as it currently is required to do and consistent with the purposes of the Communications Act.

As such, the Court should provide that the local regulatory authority, in this case the Board, is allowed sufficient jurisdiction over cable modem service to ensure that customer service elements, at a minimum, are regulated and enforced. The Board wishes to take as active a role as allowed under federal statute, and believes that the Ninth Circuit's decision, in addition to setting forth an appropriate legal foundation, best reflects the legislative intent of both the federal Act as well as the New Jersey legislative mandate to ensure that customers and the cable modem service providers are afforded an opportunity for consumer protection coupled with the continued encouragement of innovation and competition.

CONCLUSION

In light of the sound legal foundation supporting the decision of the Ninth Circuit in this matter, as well as the clear policy foundations for providing some limited regulation over cable modem service, at least as to customer service requirements, the Board respectfully joins with those parties

calling for this Court to affirm the decision of the Ninth Circuit below.

Respectfully submitted,

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